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Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-510 & 75-545

FLINT RIDGE DEVELOPMENT COMPANY,
Petitioner,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

and

CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*,
Petitioners,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

BRIEF OF PETITIONER FLINT RIDGE DEVELOPMENT COMPANY

(Cover continued on reverse side)

HARRY A. RISSETTO
EDWIN KRONFELD
THOMAS C. WATSON
HERBERT F. STEVENS
1800 M Street, N.W.
Washington, D.C. 20036

F. PAUL THIEMAN, JR.
5800 East Skelly Drive
Tulsa, Oklahoma 74135

Counsel for Petitioner
Flint Ridge Development Company

OF COUNSEL:

MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036

CROWE & THIEMAN
5800 East Skelly Drive
Tulsa, Oklahoma 74135

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a) is reported at 520 F.2d 240 (10th Cir. 1975). The opinion of the District Court (Pet. App. 1b) is reported at 382 F. Supp. 69 (E.D. Okla. 1974).

JURISDICTION

The judgment of the Court of Appeals was entered 30 July 1975 (Pet. App. 15a). The petition for a writ of certiorari of Flint Ridge Development Company was filed 2 October 1975 and was granted on 8 December 1975 (A. 86-87). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved and the relevant provisions thereof are the National Environmental Policy Act of 1969, 42 U.S.C. §§4332(2)(C)–4335, and the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§1702(a)(3), 1703(a), 1705, 1706(a), (b) and (d) and 1716. These provisions are reprinted in the Appendix to this brief.

QUESTIONS PRESENTED

1. Whether there is "major Federal action[] significantly affecting the . . . environment" requiring an environmental impact statement under Section 102(2)

(C) of the National Environmental Policy Act in connection with the filing of an antifraud disclosure statement under the Interstate Land Sales Full Disclosure Act.

2. Whether the environmental impact statement requirement of the National Environmental Policy Act overrides Section 1706(a) of the Interstate Land Sales Full Disclosure Act which affirmatively authorizes interstate land sales 30 days after filing an antifraud disclosure statement complete and accurate on its face with the Department of Housing and Urban Development, when 30 days is not long enough to complete an environmental impact statement.

STATEMENT OF THE CASE

The ultimate question to be determined by the Court is whether the Department of Housing and Urban Development (HUD) must prepare an environmental impact statement with respect to Flint Ridge Development Company's (Flint Ridge) residential subdivision development located within the Illinois River Basin in northeastern Oklahoma, pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321 *et seq.*

The courts below determined that there was major Federal action significantly affecting the quality of the human environment requiring the preparation of an environmental impact statement by HUD pursuant to NEPA because of HUD's activities in connection with Flint Ridge's filing under the Interstate Land Sales Full Disclosure Act (ILSA), 15 U.S.C. §1701 *et seq.*

When a developer is ready to sell lots through the means of interstate commerce, it must follow the filing

procedure set out in ILSA. It is important to note that ILSA specifically exempts from its provisions any lot on which a house is built or as to which the seller is obligated to build a house thereon within two years. ILSA §1702(a) (3).

Frequently a developer, prior to such filing and sales, has begun the development through such activities as site selection, financing and planning and it may have commenced the construction of utilities, roads and other common improvements in the development. In fact, under ILSA, a developer may complete the development in its entirety prior to filing with HUD.

ILSA was passed to eliminate fraud in interstate land sales. It is patterned directly after the Securities Act of 1933,[1] and thus reflects the philosophy of regulation-by-requiring-disclosure embodied in the Securities Act.[2]

[1]15 U.S.C. §77a *et seq. See* 111 Cong. Rec. 27310-11 (1965) (Remarks of Senator Williams introducing S.2672, the Interstate Land Sales Full Disclosure bill); 113 Cong. Rec. 315-16 (1967) (Remarks of Senator Williams reporting out of committee S.275, the Interstate Land Sales Full Disclosure bill). The Securities and Exchange Commission would have been entrusted with the administration of land sales disclosure under the original bills introduced in 1965 and 1967. *Id.*

[2]Although this philosophy of securities regulation, exemplified in the writing and thought of Louis D. Brandeis, in the end won out over the philosophy of *substantive government approval* of the quality of securities issues, the latter philosophy was the basis for the original 1933 bills providing for registration of securities. *See* H.R.4314 and S.875, 73d Cong., 1st Sess. (1933). Section 6 of H.R.4314, for example, provided that the Federal Trade Commission, which briefly administered the Securities Act of 1933, "... may revoke the registration of any security by entering an order to that effect, if upon examination ... it shall appear ... (e) that its or their affairs are in unsound condition or insolvent; or (f) that the enterprise or business of the issuer, or person, or the security is not based upon sound principles, and that the revocation is in the interest of the public welfare." These provisions do *not* appear in the Securities Act of 1933.

Prior to the enactment of ILSA, a few unscrupulous developers in the land development business perpetrated frauds upon purchasers. For example, purchasers later learned that it was impractical to place improvements on the property because of its topography or the property was inaccessible from existing roads; the title was not clear, or encumbrances, deed restrictions, or covenants were not disclosed; vital services were unavailable, or the developer never constructed, or indicated the true location of, improvements such as golf courses, swimming pools, or club houses that were shown in glowing brochures; and encumbrances were placed upon the property by the developer and were not paid or discharged resulting in purchasers losing their lots through foreclosure.[3] ILSA was passed to correct such abuses.

ILSA makes it unlawful to use the means or instruments of transportation or communication in interstate commerce or the mails to sell or lease non-exempt lots unless the developer has on file with HUD an "effective" statement of record and furnishes a property report to each purchaser prior to sale.[4] A property report is a condensed version of the relevant information in the statement of record. A developer files this statement of record, which includes a property report, approximately 30 days before he expects to begin sales of *non-exempt* lots. The statement of record and property report are antifraud disclosure documents including information such as the name and address of each person having an interest in the lots in the subdivision; a legal description of the subdivision, a

[3]These and other abuses were described in the remarks of Senator Williams, 113 Cong. Rec. 315-319 (1967).

[4]ILSA §1703(a).

statement as to the topography, and a map showing the lots and their relation to the existing roads; the condition of the title, including encumbrances, deed restrictions, and covenants; a statement on the present condition of access, the availability of public utilities, and the nature and estimated completion date of any improvements to be installed by the developer; and if a blanket encumbrance exists, a statement as to the consequences to the individual purchaser of a failure by the person bound, to fulfill the obligations thereunder.[5]

After the statement of record is filed with HUD, it is checked by the agency for accuracy and completeness on its face. While it is being checked by HUD, the developer may continue its development activities such as further construction of utilities, roads and other common improvements. The developer may even construct houses on lots and by doing so exempt such lots from the provisions of ILSA. The developer may also exempt lots by selling them to persons in the business of constructing houses on lots or to persons acquiring the lots for resale.

A statement of record becomes "effective" automatically 30 days after it is filed with HUD.[6] The developer may then begin sales provided it furnishes purchasers with property reports prior to sale.

The "effective" date of a statement of record can be suspended by HUD, but *only if* the statement of record appears to HUD to be ". . . on its face incomplete or inaccurate in any material respect. . . ."[7] For example, the effective date of a statement of record may be suspended if the developer fails to disclose whether or

[5] ILSA §1705.

[6] ILSA §1706(a).

[7] ILSA §1706(b).

not sewage disposal facilities will be available. If, however, the developer accurately discloses that sewage disposal facilities will *not* be available, the effective date of the statement of record *cannot* be suspended, nor could HUD require the developer to make such facilities available. The effective date of a statement of record remains suspended until only 30 days after the developer files the necessary corrections in its statement of record.[8] The legal effect of suspension of the effective date of a statement of record is to make it unlawful for the developer to begin sales.[9] Such suspension in no way prevents the developer from continuing its development activities. Further, such suspension in no way prohibits the developer from constructing and selling houses in the development.

A statement of record which is "in effect" may be suspended if it ". . . includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading. . . ."[10] For example, a statement of record "in effect" may be suspended if the developer has stated therein that sewage disposal facilities will be available but in fact they will not. The statement of record remains suspended until it has been amended, for example, to state that sewage disposal facilities will *not* be available. HUD has no authority to require the developer to make the sewage disposal facilities available. The legal effect of suspension of a statement of record is to make it unlawful for the developer to continue selling lots.[11] Such suspension in no way prevents the developer from continuing its

[8] ILSA §1706(b).

[9] ILSA §§1703(a) (1) and 1706(b).

[10] ILSA §1706(d).

[11] ILSA §§1703(a) (1) and 1706(d).

development activities. Further, such suspension in no way prohibits the developer from constructing and selling houses in the development.

Thus, under ILSA, HUD has limited power to stop sales from beginning or to halt sales in progress. This power only comes into play if the developer fails to make the required disclosure or commits a fraud. HUD has no discretion whatsoever to suspend a statement of record for any other reason.

ILSA does not require or even authorize HUD to make any decision about the merits of, much less give approval to, a subdivision:

> "The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not . . . be held to mean [HUD] has in any way passed upon the merits of, or given approval to, such subdivision."[12]

Indeed, Congress specifically intended that HUD's authority under ILSA be strictly limited to requiring disclosure to prevent fraud. Senate Report No. 1123, 90th Cong., 2d Sess. (1968) on ILSA states:

> "These requirements mean that the seller of undeveloped land covered by this title would be required to inform the purchaser not only of the desirable aspects but also of any undesirable aspects. The purchaser will then be better able to make an intelligent decision. This proposal does not authorize the Federal Government to pass upon the quality of what is being sold or upon such questions as land value, land use, or zoning. Its purpose is to give the purchaser the information necessary to make his own determination of the quality of what is being sold."[13]

[12] ILSA §1716.

[13] Senate Report No. 1123 at 110.

This legislative intent was echoed by Senator Williams, the chief sponsor of ILSA, when he said in the Congressional debates:

> "It is not a regulatory statute which will permit the Federal Government to pass upon such questions as land value, its selling price, land use, or zoning. The only purpose of this legislation is to give the purchaser the necessary information upon which he can make his own investment decision."[14]

HUD has no authority under ILSA to fund a development or to participate in its planning or construction.

Petitioner Flint Ridge is a private joint venture organized to develop and sell lots in a subdivision located in northeastern Oklahoma.

In May 1973, after site selection, financing and planning, Flint Ridge commenced construction of utilities, roads and other common improvements (R. 533).

On 5 February 1974, Flint Ridge filed its statement of record with HUD. Within 30 days, on 22 February 1974, HUD notified Flint Ridge that its statement of record was incomplete and inaccurate on its face and suspended its effective date. On 2 May 1974, after filing its corrections, Flint Ridge's statement of record became effective. Sales of lots commenced immediately and continued uninterrupted until the action of the District Court on 4 September 1974 when more than three and one-half million dollars had been spent on the development (R. 540). On the effective date of the statement of record the development was in varying

[14] 114 Cong. Rec. 15272 (1968).

degrees of completion. For example, the Community Center Clubhouse and the roads were respectively 100% and 50% complete (Pl. Ex. 1; R. 859, 391-392).

Respondents, environmental groups, in February 1974, filed a demand on HUD that prior to "approval" of Flint Ridge's statement of record, HUD was required to prepare an environmental impact statement on the development. In March 1974 HUD determined that an environmental impact statement was not required because its checking of a statement of record and requiring correction thereof was not a major Federal action significantly affecting the environment.

Respondents (Scenic Rivers) filed a complaint on 21 April 1974, and several amendments thereafter, in the District Court. Among other things, the respondents sought an injunction against any further development activities by Flint Ridge and sought to enjoin HUD from "approving" Flint Ridge's statement of record until HUD prepared an environmental impact statement. The District Court concluded that it had jurisdiction, apparently under 28 U.S.C. §1331(a).

On 4 September 1974 the District Court suspended Flint Ridge's statement of record, prohibited public sale of lots thereunder, and enjoined HUD from "approving" the statement of record until HUD prepared an environmental impact statement. The District Court did not find, however, that the Flint Ridge statement of record that became effective on 2 May 1974 was incomplete, inaccurate or fraudulent. Further, the District Court did not enjoin Flint Ridge from any further development activities on the project. Scenic Rivers did not file a cross-appeal from this portion of the District Court opinion.

The Court of Appeals affirmed in pertinent part on the ground that "major federal action significantly affecting the . . . environment was present" because of "the consequences of the government's approval of the statement [of record] in terms of ease of obtaining funds and in terms of the ultimate direct consequences on the environment of the building of the houses. . . ." (Pet. App. 9a). The Court of Appeals also found that there was no conflict between the ILSA provision which automatically authorizes sales 30 days after filing or correction of a statement of record and the environmental impact statement requirement of NEPA, which concededly could not be satisfied in 30 days, because "[t]here is nothing in the statute, however, which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement." (Pet. App. 9a).

SUMMARY OF ARGUMENT

The Flint Ridge Development is an entirely privately planned, funded and constructed residential housing development. Flint Ridge filed a statement of record with HUD pursuant to the Interstate Land Sales Full Disclosure Act (ILSA). HUD checked this antifraud disclosure document solely for completeness and accuracy on its face, suspended the statement of record until certain corrections were made, and then made it effective within 30 days after the filing of a corrected statement. This was the only Federal action relating to the Flint Ridge Development.

The National Environmental Policy Act (NEPA), Section 102(2)(C), requires the preparation of an environmental impact statement for agency proposals for major Federal actions significantly affecting the environment. HUD, under ILSA, is limited to checking the completeness and accuracy of the disclosure document and has no authority whatsoever over the private development activities that affect the environment. HUD is without power to even prevent or condition those acts which may affect the environment. Therefore, HUD did not undertake a major Federal action significantly affecting the environment.

ILSA provides that a statement of record which is complete and accurate on its face automatically becomes effective 30 days after it is filed. The preparation of an environmental impact statement under the standards and procedures in Section 102(2)(C) of NEPA cannot be completed in 30 days. One of the statutory provisions has to give way. The Court has said that Section 102(2)(C) of NEPA does not sub silentio amend or repeal by implication any other Federal statute. Therefore, the statutory scheme of ILSA must prevail.

ARGUMENT

I.

HUD DID NOT UNDERTAKE A "MAJOR FEDERAL ACTION[] SIGNIFICANTLY AFFECTING THE . . . ENVIRONMENT" REQUIRING PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT UNDER SECTION 102(2)(C) OF THE NATIONAL ENVIRONMENTAL POLICY ACT BECAUSE HUD'S AUTHORITY WAS STRICTLY LIMITED TO CHECKING AND REQUIRING CORRECTION OF FLINT RIDGE'S ANTIFRAUD DISCLOSURE DOCUMENT FILED PURSUANT TO THE INTERSTATE LAND SALES FULL DISCLOSURE ACT AND HUD DID NOT, AND HAD NO AUTHORITY TO, PARTICIPATE IN THE PLANNING, FINANCING, OR CONSTRUCTION, OR, TO AUTHORIZE, PERMIT, OR APPROVE THE FLINT RIDGE DEVELOPMENT.

Although the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, as a whole applies to all Federal agencies, "major Federal actions significantly affecting the . . . environment" is the threshold that must be met before the written environmental impact statement requirement of Section 102(2)(C) of NEPA is *triggered* with respect to a proposed Federal agency action.[15]

[15] This case does not involve the question of whether any of the other provisions of NEPA apply to HUD in its administration of ILSA. Under the authority of ILSA and NEPA, HUD could, for example, initiate a rulemaking proceeding to require environmental disclosure in statements of record. *See* Natural Resources Defense Council v. SEC, 389 F. Supp. 689 (D. D.C. 1974). Scenic Rivers requested no such relief from HUD or from the District Court.

The Flint Ridge Development is an entirely privately planned, funded, and constructed residential housing development in northeastern Oklahoma. The only Federal action taken with respect to the Flint Ridge Development was HUD's checking and requiring correction of an antifraud disclosure document, called a statement of record, filed under the Interstate Land Sales Full Disclosure Act (ILSA), 15 U.S.C. §1701 *et seq.* HUD had no responsibility for or control over the private development activities of Flint Ridge that affect the environment. The development activities of Flint Ridge that affected the environment occurred and continued independent of any HUD action.

A. Where The Federal Agency Has No Responsibility For Or Control Over The Activities Of A Private Party That Affect The Environment Because The Federal Agency Has No Discretion Under Its Organic Statute To Halt Or To Modify The Scope Of Such Activities, There Is No Major Federal Action Significantly Affecting The Environment.

One of the principal goals of NEPA was to "provide all agencies and all Federal officials with a legislative mandate and a responsibility to consider the consequences of their actions on the environment."[16] A careful reading of Section 102(2)(C) of NEPA shows that Congress intended to make the Federal government act responsibly whenever it *"proposed"* to take major

[16]Comm. on Interior & Insular Affairs, Report on National Environmental Policy Act of 1969, S. Rep. No. 296, 91st Cong., 1st Sess. 14 (1969).

action having an effect on the environment. Section 102(2)(C) of NEPA provides in pertinent part:

> "The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall–
>
> * * *
>
> "(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–
>
> "(i) the environmental impact of the proposed action,
>
> "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> "(iii) alternatives to the proposed action,
>
> "(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

The principle implicit in the above statutory language is that the Federal government act responsibly toward the environment *when and only when it has the discretion to act.* The preparation of an environmental impact statement was designed primarily as a procedure to influence the Federal government when it had discretion in its choice of actions, or inaction. The whole concept of Federal responsibility toward the environment rests, indeed, on the implied premise that the government agency has a choice under its organic statute in whether to act or not, or in the scope of its action, with respect to the environment. To require the

preparation of an environmental impact statement when the Federal government has no discretion over actions which affect the environment is to make the Section 102(2)(C) requirement an empty ritual, without meaning or purpose.

Put more broadly, Section 102(2)(C) of NEPA insures that the responsibility of Federal agencies to consider the consequences of their actions on the environment will be carried out with respect to the major Federal actions that significantly affect the environment. This is accomplished by requiring the Federal agency to give *written* consideration of the environmental consequences of those actions and to do so at the time they "propose" such action.[17] Furthermore, the environmental impact statement must "...accompany the proposal through the existing agency review processes" and be made available to the President, the Council on Environmental Quality, and the public, thus insuring such consideration. This "action-forcing" provision thus "contribute[s] to a more orderly, rational and constructive Federal response to *environmental decisionmaking*...."[18]

[17]Aberdeen and Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP II), 422 U.S. 289, 319 (1975).

[18]Comm. on Interior & Insular Affairs, Report on National Environmental Policy Act of 1969, S. Rep. No. 296, 91st Cong., 1st Sess. 9 (1969) (Emphasis supplied). *See also*, City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975) where the court stated at 670:

> "[NEPA] requires federal agencies contemplating major action to follow a procedure—preparing and considering an EIS whenever the proposed action may significantly affect the quality of the human environment.... Failing to follow this procedure creates a risk that serious and avoidable environmental consequences of the action, which an EIS would reveal, will not be brought to the attention of agency *decisionmakers*. Thus, if a particular project does in fact entail serious but nonobvious environmental impacts, agency failure to prepare an EIS may mean that the last opportunity to *eliminate* or *minimize* these impacts, in accordance with NEPA's broad objectives, has been lost." (Emphasis supplied and footnote omitted).

The written environmental impact statement requirement thus insures consideration of the consequences of Federal actions on the environment when it is used by a Federal agency to decide, for example, whether (1) to construct a large Federal project, such as a flood control dam,[19] (2) to provide Federal funds for a non-Federal project that conforms to the statutory requirement for Federal funding, such as the funding of a non-Federal penal facility,[20] or (3) to permit or prevent a private party from taking a major action significantly affecting the environment in circumstances where Federal approval is a prerequisite to the action in question, such as Federal approval for a utility to construct a primary transmission line.[21]

In this case, however, HUD had no authority under ILSA to take action itself that would affect the environment. HUD had no authority to provide funds to a private party to be used to affect the environment. HUD had no "go-ahead"[22] or "stop" power over the

[19]*See e.g.*, Environmental Defense Fund v. Corps of Engineers, 470 F. 2d 289 (8th Cir. 1972) (*en banc*).

[20]*See e.g.*, Ely v. Velde, 451 F. 2d 1130 (4th Cir. 1971).

[21]*See e.g.*, Greene County Planning Board v. FPC, 455 F. 2d 412 (2d Cir. 1972).

[22]In Biderman v. Morton, 497 F. 2d 1141 (2d Cir. 1974), the Second Circuit affirmed the denial of a preliminary injunction against non-Federal parties pending completion by the Secretary

private development activities of Flint Ridge that affected the government. HUD's authority under ILSA is limited to the four corners of an antifraud disclosure document. Moreover, HUD cannot even suspend a statement of record which meets the disclosure requirements no matter what the eventual impact of the development may be on the environment. In this case,

Note 22 – *Continued*

of Interior of an environmental impact statement on the grounds that the Federal government had no "go-ahead" power over the non-Federal actions sought to be enjoined. *Biderman* involved the Fire Island National Seashore Act, 16 U.S.C. §459e *et seq.*, which was passed to conserve and preserve the natural beauty of Fire Island. The Secretary, however, was empowered only to condemn unimproved privately-owned property and improved property zoned in an unsatisfactory manner. Plaintiffs, residents of Fire Island, sought to enjoin *local* officials from issuing zoning permits and variances until the Secretary had completed an environmental impact statement. The court pointed out that the non-Federal parties were not in partnership with, or the recipient of funds from, the Federal government and concluded that injunctive relief against the non-Federal parties was unwarranted because:

> "... [This is not] a case in which non-federal action [the zoning decisions of the Seashore municipalities] cannot lawfully begin or continue without the prior approval of a federal agency."
>
> *Id.* 1147."
>
> "We simply cannot, by granting injunctive relief, arm the Secretary with 'go-ahead' power when Congress ... saw fit not to do so."
>
> *Id.* 1148.

HUD simply had no *decision* to make regarding its activities or Flint Ridge's independent private development activities that affected the environment. To require HUD to prepare a written environmental impact statement in a situation where it has no decision to make which involves a choice of actions affecting the environment is to make the Section 102(2)(C) requirement an empty ritual without meaning or purpose. If the decision of the Tenth Circuit stands this empty ritual might have to be repeated by HUD 7,000 separate times, imposing a crushing administrative burden. This is apart from the implication of the decision for the Securities and Exchange Commission and the nation's private capital markets.[23]

B. HUD's Action Under ILSA Does Not Constitute "Major Federal Action[] Significantly Affecting The ... Environment" Under Any Of The Tests Adopted To Date.

In the five years since the enactment of NEPA, there has been no agreement as to a test for determining either what does or what does not constitute "major Federal action[] significantly affecting the ... environment."

In *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972), *cert. denied.*, 409 U.S. 990 (1972), which involved the construction of a Federal prison facility in New York City, the Second Circuit announced a two-step test that requires the preparation of an environmental impact

[23] Petition of Solicitor General at 7; *See also Id.* at 7-9 and Petition of Flint Ridge at 17-19.

statement when the Federal action is both (1) major and (2) results in a significant effect on the environment.

The Council on Environmental Quality (CEQ), created by Title II of NEPA, has adopted a like concept:

> "The action must be a (1) 'major' action, (2) which is a 'Federal action,' (3) which has a 'significant' effect, *and* (4) which involves the 'quality of the human environment.' "[24]

The CEQ has explained:

> "The words 'major' and 'significantly' are intended to imply *thresholds* of importance and impact that must be met before a statement is required."[25]

The CEQ Guidelines, like *Hanly*, require an inquiry into the scope of the Federal action to determine whether it is "major." The Guidelines also make it clear, however, that the "*Federal* action" must "involve[] the 'quality of the human environment' " In addition, the CEQ Guidelines point out that "[t]he action causing the impact must also be one where there is sufficient Federal control and responsibility to constitute 'Federal action' in contrast to cases where such Federal control and responsibility are not present. . . ."[26]

In *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974) *(en banc)*, which involved private logging operations carried out pursuant to U.S. Forest Service contracts for timber sales in a

[24]Council on Environmental Quality, Guidelines for the Preparation of Environmental Impact Statements, 40, C.F.R. §1500.6(c) (Emphasis supplied).

[25]*Id.* (Emphasis supplied).

[26]*Id.* (Emphasis supplied).

designated wilderness area,[27] the Eighth Circuit announced a single test for determining whether a written environmental impact statement is required:

> "To separate the consideration of the magnitude of federal action from its impact on the environment does little to foster the purposes of the Act. . . . By bifurcating the statutory language, it would be possible to speak of a 'minor federal action significantly affecting the quality of the human environment,' and to hold NEPA inapplicable to such an action. Yet if the action has a significant effect, it is the intent of NEPA that it should be the subject of the detailed consideration mandated by NEPA; the activities of federal agencies cannot be isolated from their impact on the environment."[28]

In *National Forest Preservation Group v. Butz*, 485 F.2d 408 (9th Cir. 1973), the Ninth Circuit announced

[27]In commenting on the Federal actions under review in *Minnesota PIRG*, the court noted that:

> "The Forest Service has been significantly involved with these timber sales since January 1, 1970, the effective date of NEPA. Its contracts require it to, *inter alia*, approve locations of timber roads, logging camps and buildings; mark the trees to be cut; and negotiate payment for the timber cut. In addition, it extended six of the sales after the effective date of NEPA and made contract modifications with the consent of the purchasers on seven of the sales
>
> "Further, there is a monetary involvement. The District Court found that the revenue the Forest Service receives from its timber sales in the BWCA is clearly inadequate to finance the reforestation program required after the mature timber is cut. This financial involvement is properly considered when determining the significance of Forest Service participation."
>
> 498 F. 2d at 1322-23.

[28]498 F.2d at 1321-22.

a "but for" test for determining whether an environmental impact statement is required.[29] The U.S. Forest Service exchanged government land in the Gallatin National Forest for lands of Burlington Northern located within and adjacent to the Forest and within Yellowstone National Park. A part of the land acquired by Burlington Northern in the exchange was to be immediately conveyed to Big Sky of Montana, Inc. for a proposed recreational development. In concluding that a written environmental impact statement was required, the court said:

> "We do not 'doubt' that NEPA applies to this massive land exchange. While the federal defendants are not themselves planning to take action 'significantly affecting the quality of the human environment,' 42 U.S.C. §4332(C), *the private defendants plan such action and the exchange is an act without which such action could not be taken.*"[30]

[29]The "but for" test is often an appropriate way to determine whether there is major Federal action significantly affecting the environment in cases where the direct Federal action is small but is a condition precedent to a large "secondary impact" caused by independent private action. This is because "but for" the small Federal action a large environmental impact would not occur. *See, e.g.* City of Davis v. Coleman, 521 F. 2d 661 (9th Cir. 1975); Scientists' Institute for Public Information (SIPI) v. AEC, 481 F.2d 1079 (D.C. Cir. 1973). These are different from the instant case, however, in at least two ways. First, in secondary impact cases, the Federal agency has complete discretion over whether or not to take the initial Federal action, be it building a highway interchange (*Davis*) or embarking on a nuclear power research and development project (*SIPI*). HUD, however, has no such discretion under ILSA because it cannot even suspend the effective date of a statement of record, or the statement of record itself, if the developer makes the required disclosure and does not commit fraud. Second, in secondary impact cases, the Federal agency action precedes and would directly cause the resulting private secondary impact. Here, however, the development of the Flint Ridge subdivision lawfully preceded and continued independently of both the filing of its statement of record *and* HUD's checking of this statement of record for completeness and accuracy.

If the Federal action must be "major," as set forth in *Hanly* and the CEQ Guidelines, and if that term is to have any meaning with respect to the *magnitude* of Federal involvement in the activities of a private party that affect the environment, then "major" must mean substantially more Federal involvement than that confined to the four corners of an antifraud disclosure document in the context of a wholly privately planned, funded, and constructed land development.

In addition, in this case, the Federal action by HUD does not, in the words of the CEQ Guidelines and as *Hanly* provides, "involve[] the 'quality of the human environment.'" HUD's actions do not either directly or indirectly affect the environment.

If, as required by *Minnesota PIRG*, the determining factor is whether the Federal action has a significant effect on the environment, regardless of whether that Federal action is "major," this test as well as the second step of the *Hanly* test are not met because the checking of the statement of record is independent of and does not cause or permit the private development actions that affect the environment.

Nor would the "but for" test in *National Forest Preservation Group* require HUD to prepare an environmental impact statement on the Flint Ridge subdivision since the development activities began long prior to the filing of the statement of record with HUD and HUD had no statutory "go-ahead" or stop power

[30]485 F. 2d at 411.

over the development before or after the statement of record became effective.

Therefore, even assuming *arguendo* that Flint Ridge took action "significantly affecting the quality of the human environment," HUD's checking and requiring correction of the statement of record was not an act without which Flint Ridge's private activities affecting the environment could be either undertaken or completed.

C. None Of The Cases Relied Upon By The Court Below Support Its Conclusion That HUD Undertook Major Federal Action Significantly Affecting The Environment Because, In Contrast To ILSA, The Organic Statutes Involved In Each Of Those Cases Provided For Federal Control Over, Involvement In, Or Approval And Funding Of The Activities Of Private Parties That Affected The Environment.

The Tenth Circuit based its conclusion that there was major Federal action affecting the environment on three lines of cases which involved matters said to be "*similar* to that here presented," a condition "*not far different* from ours," and an "*analogy*." (Pet. App. 6a, 8a). Each of the organic statutes governing the Federal agency action involved in those cases, however, provided explicitly for Federal control over, involvement in, or funding of the project in question. They stand in stark contrast to ILSA, which gives HUD no such authority.

The principal case relied upon by the Tenth Circuit and said by that court to be very similar to the instant case is *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972), litigation involving a lease by a private person of

"restricted" Indian lands requiring the approval of the Secretary of the Interior. The Tenth Circuit said:

> "The similarity between our case and *Davis* is that both involve filing and *approval* of private action."[31]

Congress, however, made it clear in ILSA that HUD's actions thereunder should not even be construed as "approval" of a statement of record, let alone as approval of the private actions of a developer that may affect the environment:

> "The fact that a statement of record with respect to a subdivision has been filed or is in effect *shall not be* deemed a finding by the Secretary that the statement of record is true and accurate on its face, *or be held to mean* the Secretary has in any way passed upon the merits of or given approval to, such subdivision."[32]

In contrast to the absence of power to "approve" in the case at bar, the relevant portion of the organic statute involved in *Davis* provides:

> "Any restricted Indian lands . . . may be leased by the Indian owners, with the *approval* of the Secretary of the Interior . . . and all leases and renewals shall be made under such *terms and regulations as may be prescribed* by the Secretary of the Interior."[33]

The court below noted that *Davis* cited with approval *Greene County Planning Board v. FPC*, 455 F.2d 412 (2d Cir. 1972), and *Izaak Walton League of America v. Schlesinger*, 337 F.Supp. 287 (D. D.C. 1971). Neither

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[31]Pet. App. 7a (Emphasis supplied).

[32]ILSA §1716 (Emphasis supplied).

[33]25 U.S.C. §415(a) (Emphasis supplied).

of these decisions involved circumstances apposite to the HUD review procedure.[34]

The court below also relied upon ten cases as either providing an "analogy" or as involving conditions said to be "not far different from ours." However, in one of the ten cases, for example, *San Francisco Tomorrow v. Romney*, 472 F.2d 1021 (9th Cir. 1973), the Ninth Circuit described the organic statute involved as follows:

> "The provisions of the Housing Act of 1949, 42 U.S.C. §1450 et seq., . . . enable basically a contractual relationship between a locality and HUD. . . . *A loan or a grant, or both,* may be made from the federal government to the locality. The Secretary may establish reasonable requirements for the program which must be complied with prior to the entering into [sic] a contract with the locality. These requirements operate as conditions precedent to the formation of the contract. §1453. . . . This statutory scheme thus provides for local adoption of a plan, *adjustment of the plan to meet HUD requirements and finally entry into an enforceable contractual relationship with HUD.*"[35]

Moreover, in each of those ten cases[36] relied upon by the court below, the Federal agency (1) had power to

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[34]The organic statute in *Greene County*, the Federal Power Act, provides in pertinent part:

> "[a]ll licenses issued . . . shall be on the following conditions: (a) That the project adopted . . . shall be such as in the **judgment of the Commission** will be best adapted to a comprehensive plan . . . and if necessary . . . **the Commission shall have authority to require the modification of any project . . . before approval.**"

16 U.S.C. § 803 (Emphasis supplied).

The organic statute involved in *Schlesinger*, the Atomic Energy Act of 1954, provides in pertinent part:

> "[s]uch licenses [construction of nuclear reactors] shall be issued . . . **subject to such conditions as the Commission may by rule or regulation establish** . . . ."

42 U.S.C. § 2133(a) (Emphasis supplied).

The regulation in dispute in *Schlesinger*, 10 C.F.R. Part 50, Appendix D, Section D.3, 36 Fed. Reg. 18071 at pp. 18075-76 (September 9, 1971), provides in pertinent part:

> ". . . the Commission may issue a license for limited operation after **consideration and balancing** of the factors . . . and upon making the appropriate findings on the matters specified . . . ."

(Emphasis supplied).

[35]472 F. 2d at 1023, n. 1 (Emphasis supplied).

[36]The organic statute in Proetta v. Dent, 484 F. 2d 1146 (2d Cir. 1973), the Public Works and Economic Development Act of 1965, in pertinent part provides:

> "[f]inancial assistance under this section shall be on such **terms and conditions** as the **Secretary determines** . . . ."

42 U.S.C. §3142(b) (Emphasis supplied).

The organic statute in Jones v. Lynn, 477 F. 2d 885 (1st Cir. 1973), is the Housing Act of 1949 discussed under San Francisco v. Romney, *supra*.

The organic statute in Silva v. Romney, 473 F. 2d 287 (1st Cir. 1973) and in Silva v. Lynn, 482 F. 2d 1282 (1st Cir. 1973), the Housing and Urban Development Act of 1968, in pertinent part provides:

> "[t]he property or project shall—(A) comply with such **standards and conditions** as the **Secretary** may **prescribe** to establish the acceptability of the property for mortgage insurance . . . ."

12 U.S.C. §1715z-1(j) (5) (Emphasis supplied).

The organic statute involved in Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974), concerning a HUD guarantee of debt

provide Federal financial assistance to non-Federal persons to be used by them to conduct activities which affect the environment and (2) had statutory authority to exercise discretion in approving or conditioning that

Note 36 – *Continued*

obligations, is the Urban Growth and New Community Development Act of 1970 (Title VII), 42 U.S.C. §4501 *et seq.*, and was described by the court as follows:

> "After a developer has successfully traversed the application process and accepted an offer of commitment, the **terms and conditions** under which he must operate are **negotiated with HUD and executed in a project agreement**. A trust indenture and a development plan are required and must set out . . . (iv) the pace, scope and detail of the developer's undertakings in terms of 1-year, 3-year and long-term periods. These documents are incorporated into the project agreement and, hence, ars [sic] enforceable at law. In addition, the developer is required each year to submit a new 1-year and 3-year plan and, if changed conditions warrant substantial alterations, a revised long-term plan. Substantial changes in any part of the development plan require **approval by the Secretary**."

502 F. 2d at 53 (Emphasis supplied).

In Monroe County Conservation Council, Inc. v. Volpe, 472 F. 2d 693, 695-96 (2d Cir. 1972), the State of New York sought " . . . to construct the highway under the Federal Aid Highway Program, 23 U.S.C. §101 et seq., with 60% federal financial reimbursement." That Act in pertinent part provides for:

> " . . . **approval** [by the Secretary of Commerce of] **surveys, plans, specifications** and **estimates** [of proposed highway projects]."

23 U.S.C. §106(a) (Emphasis supplied).

In City of Boston v. Volpe, 464 F. 2d 254 (1st Cir., 1972), the Massachusetts Port Authority was seeking Federal funding for airport development and the organic statute, the Airport and Airway Development Act of 1970, in pertinent part provides:

> "[a]ll airport development projects shall be subject to the **approval of the Secretary**, which **approval** may be given only if he is **satisfied** that . . . [and] [n]o airport development project may be **approved** by the Secretary unless **he is**

financial assistance. Under ILSA, however, HUD has no power to provide financial assistance to a development and no discretion to approve or condition either the effectiveness of a statement of record or those activities

Note 36 – *Continued*

> **satisfied** that fair consideration has been given to the interest of communities in or near which the project may be located."

49 U.S.C. §§1716(c) (1) and (3) (Emphasis supplied).

The organic statute in Upper Pecos Association v. Stans, 452 F. 2d 1233 (10th Cir. 1971), vacated and remanded to determine mootness, 409 U.S. 1021 (1972), the Public Works and Economic Development Act Amendments of 1971, in pertinent part provides that the Secretary of Commerce is authorized to make grants

> " . . . **if he finds** that –(A) the project for which **financial assistance** is sought will directly or indirectly . . . primarily benefit the long-term unemployed and members of low-income families or otherwise substantially further the objectives of the Economic Opportunity Act of 1964 . . . ."

42 U.S.C. §3131(a) (Emphasis supplied).

The organic statute in Ely v. Velde, 451 F. 2d 1130 (4th Cir. 1971), the Omnibus Crime Control and Safe Streets Act of 1968, in pertinent part provides that:

> "[t]he Administration shall make **grants** . . . [for an] **approved** comprehensive State plan . . . No state plan shall be **approved** as comprehensive **unless the Administration finds** that the plan provides for the allocation of adequate assistance to deal with law enforcement . . . ."

42 U.S.C. §3733(a) (Emphasis supplied).

Despite the Federal agency's argument that it had no discretion but to provide the funds, the court found that the agency could impose conditions on the making of a grant. 451 F. 2d at 1135 and 1137.

of a private developer that may affect the environment. In fact, all the funds necessary for the development of Flint Ridge were obtained from private sources, were secured long prior to any Federal action by HUD (Pl. Ex. 1, R. 872, 912, 919, 391-92), and were secured without any prior or subsequent Federal approval of either their procurement or use. The Federal control that forms the predicate for major Federal action affecting the environment in the ten cases relied upon by the court below—namely, a discretionary hand on the purse strings—simply does not exist under ILSA.

D. The Conclusion Of The Court Below That HUD Undertook A Major Federal Action Significantly Affecting The Environment Rests Upon A Fundamental Misunderstanding Of The Operation And Scope Of The Interstate Land Sales Full Disclosure Act.

The court below erroneously found major Federal action by HUD on the assumed existence of an unlimited HUD suspension power:

> "... [HUD has] the authority to suspend a statement, the effect of which is to *cut off raising funds in interstate which* would be otherwise available. Thus, *this allows the Federal Government to suspend a private action which would unquestionably affect the environment.*"[37]

HUD's power to suspend a statement of record or its effective date, however, *only* arises when a statement of record appears to be, on its face, incomplete or

[37]Pet. App. 6a (Emphasis supplied).

inaccurate in any material respect or is fraudulent. The statement of record must become effective within 30 days after the necessary corrections are made by the developer. If a developer makes the required disclosure, HUD has no power whatsoever to suspend the statement of record, no matter what the eventual impact on the environment. Furthermore, at no time did Scenic Rivers allege or the courts below find that the statement of record of Flint Ridge was on its face incomplete or inaccurate or fraudulent.[38]

The court below also suggests that the HUD nexus is a critical step to funding the environmental effect, thus finding that there is Federal action affecting the environment:

> "The result of approval here is that the developer is free to seek funds in commerce for the development. In each instance [here and in *Davis*] the filing is a preliminary step which is followed by substantial consequences to the environment;

[38]The reasoning of the Tenth Circuit was also criticized in *Scenic Rivers Association v. Lynn: The Effect Of NEPA on the Interstate Land Sales Act*, 124 U.Penn.L.Rev. 250, 259 (1975) where it states:

> "If HUD lacks authority to affect the environmental consequences of a development, it cannot be considered responsible for that development's adverse environmental impact. Because HUD's disapproval of the ILSA statement would hinder or prevent the development project, it might be viewed as a remote link in a chain of causation; but if HUD cannot disapprove an accurate statement even this causation theory fails. To hold, as *Scenic Rivers* seems to have done, that any such federal contact is automatically major federal action is to expand the scope of NEPA far beyond what was contemplated even in the *Davis* (discretionary authority) case. Both the district and appellate decisions in *Scenic Rivers* ignore the lack of federal power over the environmental consequences of the proposed development and in effect construe the word 'major' out of NEPA. *Scenic Rivers* should not have required an impact statement." (Footnotes omitted).

thus, there is action which leads to the development which in turn affects the human environment."[39]

The failure of this reasoning of the court below (and another difference between the instant case and *Davis*) lies in both the timing and the cause-effect relationship between governmental action on the one hand and private action on the other. In *Davis*, but for the Secretary's *approval* of the leases, no private action affecting the environment could have even begun. In the case at bar, however, it is undisputed that after the site selection, acquisition, planning, and securing of funds for development, the actual construction of the Flint Ridge development began in May 1973 (R. 533). Flint Ridge filed its statement of record in February 1974 (R. 691). Therefore, the Federal action of HUD was not a preliminary step and was not followed by, and thus did not cause, consequences to the environment. Indeed, the private actions of Flint Ridge which affected the environment lawfully preceded any Federal action by HUD. Consequently, there is simply no Federal action which "leads to the development which in turn affects the human environment."

The decision also fails to recognize where HUD's authority stops under ILSA and the authority of State law takes over. For example, the Tenth Circuit relied upon a finding by the District Court that septic tanks in the development were discharging sewage into the Illinois River.[40] The Oklahoma State Department of Health regulates septic tanks and has statutory authority to prohibit pollution therefrom.[41] The

[39]Pet. App. 7a.

[40]This finding was not appealed *only* because Flint Ridge maintains that it is irrelevant to the issues.

[41]63 Okla. Stat. Ann. §§1-909 & 1-910.

Commissioner of the State Department of Health and two registered, professional sanitarians employed by the State Department of Health testified that the use of septic tanks in the Flint Ridge Development was approved by the State Department of Health and would not pollute the Illinois River and this testimony was based on percolation tests of the land in the development (A. 66-69, 71-75). The only conceivable basis for the District Court's finding was the nonexpert opinion testimony of Scenic Rivers' witnesses, Jerry Overton and Thomas Aley. Overton, a grduate student in geography, offered his opinion, based on a study he made of the Illinois River Basin, that effluent from septic tanks in the development would flow into tributaries and in some cases into the Illinois River almost as primary sewage (R. 59). On cross-examination, however, Overton admitted that his study did not even include a determination of the type of soil found in Delaware County, Oklahoma, in which the development is located (A. 13). Aley, a hydrologist, testified to the same effect on the basis of an experimental test he conducted on one septic tank located in Doniphan, Missouri, approximately 250 miles from Flint Ridge, where according to Aley, the soil conditions were greatly similar (A. 44-46). On cross-examination, Aley admitted that although he had read some unidentified soil reports he did not conduct any soil analysis in the Flint Ridge area (A. 45-46) and made no inquiry as to the type of septic tanks to be used in the development (A. 46-47). This testimony piles presumption upon presumption to reach the dizzying heights of pure speculation.

The finding by the District Court is tantamount to concluding that the responsible officials of the State of Oklahoma ignore or are incompetent to enforce the laws of that State. Furthermore, neither of Scenic Rivers' witnesses testified that HUD had anything whatsoever to do with the septic tanks in the development. If the holding of the court below is allowed to stand, HUD will be forced by the courts into the business of passing on the environmental merits of developments and second-guessing the responsible officials in every state in the union.

II.

THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE ANNOUNCED IN SCRAP I THAT NEPA DOES NOT SUB SILENTIO AMEND OR REPEAL BY IMPLICATION ANY OTHER STATUTE BECAUSE NOTWITHSTANDING THAT ILSA MAKES FILINGS THEREUNDER AUTOMATICALLY EFFECTIVE IN 30 DAYS AND AUTHORIZES SUSPENSION OF FILINGS ONLY FOR INCOMPLETENESS OR INACCURACY ON THEIR FACE OR FOR FRAUD, THE DECISION BELOW SUSPENDED FLINT RIDGE'S FILING INDEFINITELY BEYOND THE 30 DAYS SOLELY TO GIVE HUD TIME TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT.

In *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP I), 412 U.S. 669 (1973), the Court faced the question of whether NEPA sub

silentio amended or repealed by implication Section 15(7) of the Interstate Commerce Act. The District Court in SCRAP I found that NEPA empowered it to enjoin the Interstate Commerce Commission (ICC) from permitting, and the railroads from collecting, an interim surcharge on recyclable goods, notwithstanding the holding in *Arrow Transportation Co. v. Southern Ry. Co.*, 372 U.S. 658 (1963), that Section 15(7) vested the sole and exclusive power to temporarily enjoin collection of rates in the ICC and withdrew such power from the judiciary. The injunction was issued on the ground that the ICC orders refusing to suspend the surcharge were unlawful under Section 102(2)(C) of NEPA because they constituted major Federal action significantly affecting the environment for which the ICC had not prepared a written environmental impact statement. The Court concluded that NEPA did not repeal by implication Section 15(7) of the Interstate Commerce Act:

> "The statutory language, in fact, indicates that *NEPA was not intended to repeal by implication any other statute.* Thus, 42 U.S.C. §4335 specifies that '[t]he policies and goals set forth in [NEPA] are supplementary to those set forth in existing authorizations of Federal gencies,' and 42 U.S.C. §4334 instructs that the Act 'shall [not] in any way affect the specific statutory obligations of any Federal agency. . . .' Rather than providing for any wholesale overruling of prior law, NEPA requires all federal agencies to review their 'present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of

> [NEPA] and shall propose to the President . . . such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in [NEPA].' 42 U.S.C. §4333. It would be anomalous if Congress had provided at one and the same time that federal agencies, which have the primary responsibility for the implementation of NEPA, must comply with present law and ask for any necessary new legislation, but that the courts may simply ignore what we described in *Arrow* as 'a clear congressional purpose to oust judicial power. . . .' "[42]

ILSA is a carefully devised statutory scheme to prevent fraud without imposing stifling regulatory burdens on the economically important business of interstate land sales. The statutory scheme is a simple one. The developer must file an antifraud disclosure document called a statement of record with HUD. Section 1706(a) of ILSA provides for a statement of record to *automatically* become "effective" 30 days after filing and the developer may then begin sales. Under Section 1706(b), the effective date of a developer's statement of record can be suspended *only* on the ground that the statement of record appears to HUD to be ". . . on its face incomplete or inaccurate in any material respect. . . ." In that event, the effective date is suspended only until 30 days after the developer files the necessary corrections in its statement of record. Under Section 1706(d), an effective statement of record can be suspended only if it contains an untrue statement of material fact or omits a material fact. In that event, the statement of record remains

[42]412 U.S. at 694-95 (Emphasis supplied and footnote omitted).

suspended only until the developer files the necessary corrections. The effect of suspension is to stop sales from beginning or halt sales in progress. The power of HUD to suspend, therefore, comes into play *only* if the *developer* fails to make the required disclosure—and not because of anything HUD either does or fails to do. HUD has no discretion to suspend a statement of record for any other reason.[43] ILSA neither requires nor allows HUD to make any judgment about the merits of the underlying development. Congress thus devised a statutory scheme that gives HUD suspension power to prevent fraud but erects a barrier against any *Government caused delay* beyond the initial 30-day period.

It is undisputed that an environmental impact statement under NEPA cannot be completed in 30 days. First, collection of the sheer mass of information and data required and the analysis thereof requires substantially more than 30 days.[44] Second, preparation of an environmental impact statement in accordance with the CEQ Guidelines requires that when the draft environmental impact statement is prepared, other Federal agencies be given not less than 45 days to comment.[45] Third, when the final environmental impact statement is prepared the CEQ Guidelines provide that the agency shall not take action until 30

[43]This clear statutory limitation on the suspension power of HUD was ignored by the court below when it stated that:

> "There is nothing in the statute, however, which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement." (Pet. App. 9a).

[44]*See* Council on Environmental Quality, Guidelines for Preparation of Environmental Impact Statements, 40 C.F.R. §1500.8.

[45]*Id.* 40 C.F.R. §1500.9(f); *see also* NEPA §102(2)(C).

days after filing with the CEQ.[46] Fourth, the CEQ Guidelines provide that in any event agency action shall not be taken until a minimum of 90 days after the draft environmental impact statement is circulated for comment.[47]

Thus, ILSA gives HUD 30 days to act, absent incomplete disclosure, but HUD cannot complete an environmental impact statement in 30 days. The decision below suggests that this operational conflict between ILSA and NEPA could be accommodated in the following way:

> "Thus, a developer could give advance notice to HUD of its intent to sell land in interstate commerce, whereby HUD could commence the preparation of its impact statement."[48]

In order to begin preparing an environmental impact statement, however, HUD must at the very least know what a developer plans to do with the land, including the size, location and number of lots, utilities, sewers, roads and other improvements. When a developer knows that information he is prepared to file his statement of record. Thus, if the developer refrains from filing in order to give HUD "advance notice," the *Government caused delay* is merely shifted forward.

The decision below concludes that the effective date of a statement of record must be suspended beyond the 30 days *solely* because HUD must first complete an environmental impact statement. The statutory scheme of ILSA that authorizes a developer to begin sales 30 days after filing or correcting a statement of record and prohibits Government caused delay thereafter is thereby repealed by the court below.

[46]*Id.* 40 C.F.R. §1500.11(b).

[47]*Id.*

[48]Pet. App. 9a-10a.

There is no reason, however, to frustrate the statutory scheme of ILSA in order to provide for environmental disclosure. For example, HUD could initiate a rule-making proceeding to require environmental disclosure in statements of record and property reports—consistent with the statutory scheme of ILSA.[49] Respondents requested no such relief from HUD or from the District Court.

The decision below defeats the statutory scheme of ILSA and thus conflicts with the principle announced by the Court in SCRAP I that NEPA does not sub silentio amend or repeal by implication any other statute.

[49]*See Natural Resources Defense Council v. SEC*, 389 F. Supp. 689 (D. D.C. 1974).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below, to the extent that it affirms the judgment of the District Court, should be reversed.

Respectfully submitted,

HARRY A. RISSETTO
EDWIN KRONFELD
THOMAS C. WATSON
HERBERT F. STEVENS
1800 M Street, N.W.
Washington, D.C. 20036

F. PAUL THIEMAN, JR.
5800 East Skelly Drive
Tulsa, Oklahoma 74135

Counsel for Petitioner
Flint Ridge Development Company

OF COUNSEL:

MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036

CROWE & THIEMAN
5800 East Skelly Drive
Tulsa, Oklahoma 74135

APPENDIX

STATUTES INVOLVED

National Environmental Policy Act of 1969, United States Code, Title 42

§4332.

The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall–

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the

comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * *

§4333.

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

§4334.

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act,

or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

§4335.

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

Interstate Land Sales Full Disclosure Act,
United States Code, Title 15

§1702

(a) Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to–

* * *

(3) the sale or lease of any improved land on which there is a residential, commercial, or industrial building, or to the sale or lease of land under a contract obligating the seller to erect such a building thereon within a period of two years;

* * *

§1703.

(a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails–

(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1706 of this title and a printed property report, meeting the requirements of section 1707 of this title, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser; and

(2) in selling or leasing, or offering to sell or lease, any lot in a subdivision—

(A) to employ any device, scheme, or artifice to defraud, or

(B) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report or with respect to any other information pertinent to the lot or the subdivision and upon which the purchaser relies, or

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

* * *

§1705.

The statement of record shall contain the information and be accompanied by the documents specified hereinafter in this section—

(1) the name and address of each person having an interest in the lots in the subdivision to be covered by the statement of record and the extent of such interest;

(2) a legal description of, and a statement of the total area included in, the subdivision and a statement of the topography thereof, together with a map showing the division proposed and the dimensions of the lots to be covered by the statement of record and their relation to existing streets and roads;

(3) a statement of the condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions and covenants applicable thereto;

(4) a statement of the general terms and conditions, including the range of selling prices or rents at which it is proposed to dispose of the lots in the subdivision;

(5) a statement of the present condition of access to the subdivision, the existence of any unusual conditions relating to noise or safety which affect the subdivision and are known to the developer, the availability of sewage disposal facilities and other public utilities (including water, electricity, gas, and telephone facilities) in the subdivision, the proximity in miles of the subdivision to nearby municipalities, and the nature of any improvements to be installed by the developer and his estimated schedule for completion;

(6) in the case of any subdivision or portion thereof against which there exists a blanket encumbrance, a statement of the consequences for an individual purchaser of a failure, by the person or persons bound, to fulfill obligations under the instrument or instruments creating such encumbrance and the steps, if any, taken to protect the purchaser in such eventuality;

(7) (A) copy of its articles of incorporation, with all amendments thereto, if the developer is a corporation; (B) copies of all instruments by which the trust is created or declared, if the developer is a trust; (C) copies of its articles of partnership or association and all other papers pertaining to its organization, if the developer is a partnership, unincorporated association, joint stock company, or any other form of organization; and (D) if the purported holder of legal title is a person other than developer, copies of the above documents for such person;

(8) copies of the deed or other instrument establishing title to the subdivision in the developer or other person and copies of any instrument creating a lien or encumbrance upon the title of developer or other person or copies of the opinion or opinions of counsel in respect to the title to the subdivision in the developer or other person or copies of the title insurance policy guaranteeing such title;

(9) copies of all forms of conveyance to be used in selling or leasing lots to purchasers;

(10) copies of instruments creating easements or other restrictions;

(11) such certified and uncertified financial statements of the developer as the Secretary may require; and

(12) such other information and such other documents and certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers.

§1706.

(a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incomplete or inaccurate in any material respect, the Secretary shall so advise the developer within a reasonable time after the filing of the statement or the amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the

developer files such additional information as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request by the Secretary.

* * *

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in accordance with such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

* * *

§1716.

The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing.